In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1680

IN RE MARY ALICE RELF, MINNIE RELF and KATIE RELF, by and through their next friend, LONNIE RELF, *Petitioners*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners Mary Alice Relf, Minnie Relf, and Katie Relf, by and through their next friend, Lonnie Relf, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the denial of Petitioners' Petition for a Writ of Mandamus to compel the District Court for the District of Columbia to hold an evidentiary hearing to determine whether to admit Mr. Melvin M. Belli *pro hac vice* to try a case before it.

The denial of the motion to admit Mr. Belli to appear *pro hac vice* was made in open court on November 8, 1976. The Petition for Writ of Mandamus was filed on December 1, 1976, and a Supplemental Brief was filed on January 28, 1977. The Court of

Appeals for the District of Columbia Circuit denied the Petition for a Writ of Mandamus on March 3, 1977.

OPINION BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit denying the Petition, including Circuit Judge Leventhal's dissent, appears as Appendix A hereto. The transcript of the proceedings before the Honorable Oliver Gasch, United States District Judge, District of Columbia, is appended hereto as Appendix B.

JURISDICTION

The denial of Petitioners' Petition for Writ of Mandamus was entered on March 3, 1977. This Petition has been filed within ninety days thereof. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a District Court can summarily deny the motion of a member of the bar to admit *pro hac vice* an attorney duly licensed to practice in another jurisdiction and a member in good standing of the bar in that jurisdiction, when the denial is based upon the attorney's exercise of rights guaranteed by the First Amendment of the Constitution of the United States.

STATUTORY PROVISION INVOLVED

United States District Court for the District of Columbia Rule 1-4(a)2:

> An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any state, but who does not qualify under the requirements of Subsection (1) above may enter an appearance and file pleadings in this Court provided that such attorney joins of record a member of the bar of this Court who does meet the requirements of Subsection (1) and who will at all times be prepared to go forward with the case. If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

On November 8, 1976, a motion was made to the United States District Court for the District of Columbia to admit Melvin M. Belli, Esq., a member of the California Bar, *pro hac vice* for purposes of trial in the case of *Relf v. United States,* Civil No. 74-224 (D.D.C., filed Feb. 4, 1974). The case concerns two Alabama citizens who at ages 12 and 14 were involuntarily and permanently surgically sterilized under

a program funded by the United States Department of Health, Education and Welfare.

The motion to admit Mr. Belli *pro hac vice* was made by Henry Weil, Esq., of the District of Columbia Bar. At the time of the motion Mr. Belli was a member in good standing of the bar of the State of California. He had complied with all local rules, including Rule 1-4(a)2 of the District of Columbia. Rule 1-4(a)2 requires only that an attorney who seeks to be admitted *pro hac vice* be a member in good standing of the bar of any United States Court or the highest court of any state and that he join of record a member of the bar of the Court. Additionally, if he wishes to be heard in open court, the attorney must obtain the trial court's permission.

In spite of Mr. Belli's compliance with the local rules, the Honorable Oliver Gasch, the trial judge, summarily denied Mr. Belli's application to be admitted to practice in the district. In fact, the transcript reveals that Judge Gasch, purportedly relying upon a "prior ruling" in a totally unrelated case, would not even permit a written motion and order on Mr. Belli's behalf to be filed with the Court:

> MR. WEIL: . . .
>
> At this time . . . Your Honor, preliminarily, I'd like to file with the Court to admit as co-counsel along with Mr. Russell for purposes of trial, the admission pro hac vice of Melvin M. Belli.
>
> THE COURT: The Court has ruled on Mr. Belli's status. That will be denied. . . .
>
> MR. WEIL: Would Your Honor want to accept the papers for filing?

> THE COURT: The Court has ruled on Mr. Belli's proposal.
>
> Transcript of proceedings, *In re Relf,* Nov. 8, 1976.

The trial court's statement that it had already "ruled" on Mr. Belli's status apparently referred to a decision rendered three years earlier in an entirely different matter. In that decision, *In re Belli,* 371 F. Supp. 111 (D.D.C. 1974), the same trial judge had denied Mr. Belli's admission *pro hac vice* in a medical malpractice case because of comments made in the course of a nationally broadcast television appearance on the "Merv Griffin Show."[1] Mr. Belli's statements obliquely referred to the case of *Morris v. Children's Hospital,* Civil No. 575-71 (D.D.C. Apr. 18, 1973), in which he represented a child who had been blinded through the negligence of a local hospital.[2] The $900,000 jury verdict in favor of the child was set aside by a trial judge who had failed to reveal that his son belonged to a firm which represented the District of Columbia Medical Society, whose membership included ninety percent of the physicians in the District of Columbia and all of the witnesses who appeared for the defendant hospital during the trial.

Following Mr. Belli's televised remarks, all fourteen of the judges of the Washington, D.C. federal

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[1] The text of Mr. Belli's remarks appears in *In re Belli, supra,* 371 F. Supp. at 112-13 n.6.

[2] In point of fact, Mr. Belli never mentioned Judge Smith, the trial judge, or the *Morris* case by name on the Griffin show; these facts were revealed only when the judges themselves issued a public resolution which is described more fully *infra.*

district court met in secret "executive session" on June 22, 1973, and adopted a resolution summarily finding Mr. Belli guilty of failing to "maintain a respectful attitude toward the court."[3]

Although Mr. Belli was given no notice whatsoever of the meeting in executive session, no opportunity to be heard as to his side of the controversy, and no chance to obtain counsel or witnesses in his behalf,[4] the judges nevertheless made public and forwarded the unanimous resolution to the State Bar of California for "such action as you deem appropriate."[5] The only named complainant against Mr. Belli in this action was Judge Sirica, on behalf of the District of Columbia judges. No member of the public ever complained about this matter.

Among the judges participating in this session and approving what amounted to a punishment[6] of Mr.

[3]This was precisely the ultimate finding required under the California State Bar rules to discipline Applicant Belli for unprofessional conduct. Cal. Bus. & Prof. Code §6068(b) (West 1974); *Hogan v. State Bar*, 36 Cal.2d 807, 810, 228 P.2d 554 (1951).

[4]The authorities universally agree that "[e]verywhere [the lawyer subject to disciplinary proceedings] has the right to a full hearing, with ample notice." H. Drinker, *Legal Ethics*, 35 (1953). In fact, the judicial canons themselves require that a judge "accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law," and "neither initiate nor consider *ex parte* communications concerning a pending or impending proceeding." ABA Code of Judicial Conduct, Canon 3.A(4).

[5]"A judge should abstain from public comment about pending or impending proceedings in any court" until the matter is properly adjudicated. ABA Code of Judicial Conduct, Canon 3.A(6).

[6]As Petitioners argued in their Supplemental Brief to the Court of Appeals for the District of Columbia Circuit, the resolution of the federal district court judges was in the nature of a bill of attainder, expressly prohibited by the Constitution. U.S. Const. art. I, §9, cl. 3, §10, cl. 1.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial and the attendant safeguards required at trial. "Punishment" is not restricted to the deprivation of life, liberty or property, but also embraces the suspension, deprivation or extinguishment of political or civil rights. Hence, "exclusion from any of the professions or from any of the ordinary avocations of life may be regarded in no other light than as punishment." *Ex parte Garland*, 71 U.S. (4 Wall.) 277 (1867). *See also, In re Ruffalo*, 390 U.S. 544, 550 (1967).

Petitioners do not dispute that the judges had the right to gather in executive session to consider Mr. Belli's remarks and to pass a resolution authorizing either the commencement of disciplinary proceedings, with due process, against him, or, finding no jurisdiction to do so, to transmit the facts to an appropriate disciplinary body. But they far exceeded their lawful authority by finding Belli, *ex parte* and in secret, guilty of serious offenses against acceptable professional ethics. Their action thus constituted an illegal exercise of quasi-legislative powers and was in the nature of an unconstitutional bill of attainder.

Belli was Judge Oliver Gasch. It was Judge Gasch who subsequently wrote the memorandum opinion which deprived Mr. Belli of the right to appear in a later malpractice case, on the grounds that his Griffin show comments were "calculated to prejudice the standing of this Court and to cast a shadow upon its integrity and that of one of its judges . . . without factual foundation and . . . recklessly made," and that "Mr. Belli acted in complete disregard as to the factual accuracy of his statements." *In re Belli, supra*, 371 F. Supp. at 113-14.

Judge Gasch's opinion resulted from an informal, *in camera* proceeding, the nature and subject matter of which Mr. Belli was not apprised prior to his appearance before the judge. Indeed, Mr. Belli thought that it was an informal discussion in chambers, not a hearing. He was amazed when an "opinion" subsequently appeared in the Federal Supplement. He

had neither the requisite notice to enable him to prepare to meet the false charges hurled against him, nor the opportunity to dispute the factually inaccurate statements which the court later attributed to him. In addition, the failure of the court to make any record of this thoroughly unexpected *in camera* proceeding is highly unusual for a "hearing."

Subsequent to the opinion in ***In re Belli, supra,*** on October 6, 1975, a duly constituted disciplinary committee of the State Bar of California fully exonerated Mr. Belli of charges of professional and ethical misconduct flowing from these comments. After reviewing a massive body of evidence and testimony presented in an exhaustive three-day adversary hearing, the Committee found that the statements made by Mr. Belli, though factually incorrect in certain minor respects, were substantially true; that the charges of unethical or unprofessional conduct lodged against him were unsupported by the facts; and that there was *no* proof that the incidental remarks at issue which were inaccurate had been made recklessly or with gross negligence or with any knowledge of their falsity. The Committee's findings and recommendations appear as Appendix C hereto.

In the wake of the favorable decision by the California State Bar committee, Mr. Belli again sought admission *pro hac vice* in another malpractice case, *Davis v. United States,* Civil No. 75-0843 (D.D.C. 1976). Admission in this case was denied, but Mr. Belli elected not to pursue any appellate remedy at that time because an appeal by the State Bar Ex-

aminer was still pending. By the time of Mr. Belli's application to appear *pro hac vice* in the *Relf* case, however, the Bar's appeal had been unanimously rejected by the State Bar Board of Governors, and Mr. Belli's matter had been finally and definitely resolved in his favor.

The Honorable Judge Gasch refused even to consider these significant developments in summarily denying the *pro hac vice* motion. Petitioners respectfully submit that this arbitrary action by the trial court has deprived Mr. Belli of his cherished right to practice in the District of Columbia without just cause and without affording any of the rudiments of due process; has unduly infringed upon his First Amendment right to speak freely in criticism of public figures without fear of arbitrary reprisals; has flagrantly violated principles of collateral estoppel and comity by failing to give any recognition to a favorable ruling by Mr. Belli's own State Bar, where the matter was sent by Judge Sirica, after an exhaustive adversary hearing; and has illegitimately deprived Petitioners of the right to be represented in this landmark tort/civil rights case by a man of Mr. Belli's significant talent and the experience obtained in his forty years of practice before courts throughout the United States and the world.

Petitioners seek review by this Court of the denial of their Petition for Writ of Mandamus by way of this Petition for a Writ of Certiorari, in order to avert the irreparable harm to Mr. Belli and his clients which will otherwise ensue from the trial

court's failure to exercise its discretionary power, its gross abuse of that power to the extent exercised, and the court's failure to perform its ministerial duties in a fair and constitutionally legitimate fashion.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE DISTRICT COURT PUNISHES THE EXERCISE OF CONSTITUTIONAL RIGHTS AND DENIES MR. BELLI DUE PROCESS.

1. The trial court's decision punishes Mr. Belli for the exercise of rights protected by the First Amendment.

It may be argued that regardless of Mr. Belli's exoneration of any actionable misconduct by the State Bar of California, a federal trial court may nevertheless, in its discretion, find the television show statements to be sufficiently "unlawyerlike" to permit it to bar Mr. Belli's admission *pro hac vice*. Such an argument must fail on constitutional grounds.

Mr. Belli's television comments come within the ambit of the First Amendment to the United States Constitution. Though inaccurate in minor respects, the comments are protected speech because, as determined by the State Bar of California, they were not made in conscious knowledge of their falsity or in reckless disregard of the truth. *In re Relf*, No. 76-2073 (D.C. Cir. Mar. 3, 1977) (Leventhal, C. J., dissenting). Mr. Belli may therefore not be punished either criminally or civilly for their utterance. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276, 270-80 (1964). In fact, the principle anounced in *New York Times* was specifically made applicable to state-

ments directed at judicial officers. Thus, this Court observed:

> Injury to official reputation affords no more warrant for repressing free speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation". Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. 376 U.S. at 272-73 (citations omitted).

In a series of decisions involving the constitutionality of a trial court's power to hold persons in contempt for offensive published statements, the Supreme Court has consistently held that "[f]reedom of discussion should be given the widest possible range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). Consequently, absent an imminent threat to the administration of justice, a judge may not punish one "who ventures to publish anything that tends to make him unpopular or to belittle him . . . ." *Craig v. Harney*, 331 U.S. 367, 376 (1947); *see also, Wood v. Georgia*, 370 U.S. 375, 389 (1962). This Court has long stated such a view to be the only one consistent with the First Amendment or common sense:

> The assumption that respect can be won by shielding judges from published criticism wrongly

> appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more that it would enhance respect. *Bridges v. California,* 314 U.S. 252, 270-71 (1941) (footnotes omitted).

Since the trial court could not have held Mr. Belli in contempt for his comments, nor could the judge against whom the comments were directed have sued civilly for libel, it follows that the trial court may not now punish Mr. Belli for these same remarks by denying him the right to practice his profession before it. Absent "malice", the laws and courts may not be used to inhibit constitutionally protected speech by punishing those who avail themselves of their First Amendment right to speak. *New York Times Co. v. Sullivan, supra,* 376 U.S. at 276.

Nor is judicial discretion to admit an attorney *pro hac vice* a cloak for ransoming the First Amendment. If Mr. Belli was entitled to speak at all, a court may not, as a consequence, deny him the means to practice his profession in a court of the United States, and thereby deny the Relfs the right to the counsel of their choice. An attorney does not forfeit the protection of the Constitution simply because he is an officer of the court.

2. The trial court's decision deprives Mr. Belli of the right to practice and imposes upon him a "badge of infamy" without due process.

The district court's action in summarily denying Mr. Belli admission *pro hac vice* is constitutionally infirm in that it completely fails to afford him procedural due process before excluding him from practicing law before the court. This basic constitutional safeguard, which attorneys *must* be afforded, was discussed by this Court in *Willner v. Committee on Character and Fitness,* 373 U.S. 96, *clarification denied,* 375 U.S. 950 (1963), as follows:

> . . . [T]he requirements of procedural due process must be met before a State can exclude a person from practicing law. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." . . . [T]he right is not "a matter of grace and favor." 373 U.S. at 102 (citations omitted).

The Court held there that due process requires that before denial of an application for admission to the bar for lack of the requisite character and fitness, the applicant *must* be given an opportunity to refute the evidence introduced against him and to cross-examine witnesses who supply information adverse to him. *Willner v. Committee on Character and Fitness, supra,* 373 U.S. at 104. This rule is applicable to federal district judges who attempt to disbar attorneys without first granting them a hearing or an opportunity to be heard. *Burkett v. Chandler,* 505 F.2d 217, 222 (10th Cir. 1974).

In the recent case of *In re Evans,* 524 F.2d 1004 (5th Cir. 1975), where the petitioner raised issues identical to those now before this Court, the Fifth Circuit recognized the constitutional imperative of affording a hearing to an attorney before denying him admission *pro hac vice:*

> If a District Court has evidence of behavior that it believes justifies denying an attorney admission *pro hac vice,* it must set a hearing date and give the attorney adequate notice of all incidents of alleged misbehavior that will be charged against him. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. 524 F.2d at 1008.

The conclusion reached in *In re Evans, supra,* is inescapable. The license to practice law generally, or the right to practice before a particular court of the United States after meeting all of the formal prerequisites is in the nature of a property interest [illegible] deprivation of which has drastic consequences [illegible] individual. Fairness and justice require that no person be subject to divestment of such an interest without being afforded substantial due process. *In re Ming,* 469 F.2d 1352, 1355 (7th Cir. 1972).

Although the denial of admission to appear *pro hac vice* may not perhaps impose the same drastic divestment as exclusion from a state bar entirely, it is nevertheless true, and certainly not to be disputed here, that the value to an attorney of appearing before a federal court is *not* de minimis. And, in the words of this Court, "as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss v. Lopez,* 419 U.S. 565, 576 (1975).

It is to be noted, moreover, that by summarily denying Mr. Belli admission *pro hac vice,* despite his having met all of the formal prerequisites of admission, the trial court improperly imputed to him professional and ethical misconduct. This totally unmerited imputation,[1] which Mr. Belli was given no opportunity to refute, attaches to him a "badge of infamy"—a moral stigma. In fact and law Mr. Belli was cleared by the California Bar to whom Judge Sirica sent his resolution. Notions of due process require that Mr. Belli be given an opportunity to remove this "badge" and vindicate his honor. Thus, this Court has held:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . [o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented. *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

---

[1] Although not conclusive, admission to a state bar raises the presumption that an attorney has met both professional and ethical qualifications necessary to practice before a federal court. *See In re Ruffalo, supra,* 390 U.S. at 547.

In the case at bar, Judge Gasch imposed upon Mr. Belli a punishment and a "badge of infamy" without affording him a fair hearing or a fair opportunity to erase the undeserved stain upon his reputation. As a result, he has been denied the opportunity to devote his vast experience to the cause of Petitioners herein, two young black girls involuntarily sterilized through the misuse of government funds. Petitioners urge that the facts of the instant case compel the issuance of such a Writ of Certiorari to correct this denial of due process.

3. The trial court's decision was arbitrary, capricious and unreasonable.

No federal reviewing court has ever sustained, or suggested that it would sustain, a denial of admission *pro hac vice* where the applicant was a member in good standing of his home state's bar, had complied with all formal requirements set forth in the applicable local rule of court, had not engaged in "unlawyerlike conduct" in connection with the case in which he wished to appear, and had not been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court.

Indeed, the most recent case of *In re Evans, supra,* forthrightly supports the position that for purposes of admission to practice in federal court, the basic determinant of both professional and ethical qualifications is admission to a state bar. There the Fifth Circuit held:

> Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whim of the District Court. An applicant for admission *pro hac vice* who is a member in good standing of a state bar may not be denied the privilege to appear except "on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." 524 F.2d at 1007.

This holding is consistent with the principle that a litigant is entitled, wherever possible, to be represented by counsel of his choice. *Sanders v. Russell,* 401 F.2d 241, 246 (5th Cir. 1968). And a court is without discretion to deprive a party of this important choice by denying admission *pro hac vice* in instances where counsel has complied with all formal prerequisites of admission and been guilty of no "unlawyerlike conduct" in connection with the case in which he wishes to appear. Mandamus will lie to compel the court to perform its ministerial functions in this respect. *See Munoz v. United States District Court for the Central District of California,* 446 F.2d 434 (9th Cir. 1971).

It is true that the Court of Appeals for the Fourth Circuit in *Thomas v. Cassidy,* 249 F.2d 21 (1957), *cert. denied,* 355 U.S. 958 (1958), held that the granting of permission to a non-resident attorney to practice *pro hac vice* was a matter of "grace" resting in the

sound discretion of the judge.[a] The court in *Thomas*, however, specifically found that "unlawyerlike conduct" of plaintiff's counsel *in the same case in which he wished to appear pro hac vice*, and for which the court had denied him admission, was supported by the findings and was therefore not an abuse of discretion. 249 F.2d at 92.

The courts have distinguished *Thomas* on this basis and have granted admission *pro hac vice* absent a showing of "unlawyerlike conduct in connection with the case in which [the non-resident attorney] wished to appear." *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 11 (S.D.N.Y. 1964); *see also, Gerecht v. American Insurance Co.*, 344 F. Supp. 1056, 1063 (W.D. Mo. 1971); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 578 (D. Minn. 1968).

Thus, the prerogative of a trial judge to exclude out-of-state counsel is not an absolute right. *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir. 1975). Discretion

[a]The use of the word "grace" is misleading. Petitioners are children who have been cruelly injured. They do not request that a court bestow "grace" upon them, but only that the court secure justice for them. A court is not a cathedral. Discretion can never be a matter of "grace", for it is always a matter of duty. Bruised feelings, tender sensitivities, or injured pride cannot withstand the power of law and the compulsion of a judge's duty. The words of Chief Justice Marshall are particularly apt in this respect:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law. *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) (emphasis added).

to exclude has arisen *only* when an applicant has engaged in, or would potentially engage in, unprofessional or unethical conduct in relation to the case for which admission *pro hac vice* is sought. *See Atchison, Topeka and Santa Fe Railway Co. v. Jackson*, 235 F.2d 390, 392-93 (10th Cir. 1956); *Reda, supra*, 510 F.2d at 1173.

The rationale here is clear. Unless the "unlawyerlike conduct" arises during the course of litigating the suit, the trial judge has no adequate basis upon which to exercise his discretion to deny admission. To the contrary, the applicant, if in fact a member in good standing of a state bar, is presumed to have met both professional and ethical qualifications necessary to practice before a federal court. *See In re Ruffalo, supra*, 390 U.S. at 547. Only after an appropriate hearing at which the applicant has been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court may a trial court exercise its discretion to deny admission *pro hac vice*. *In re Evans, supra*, 524 F.2d at 1008.

It bears repeating that Mr. Belli has asserted before the District Court and the Court of Appeals for the District of Columbia that he is a member in good standing of the California Bar, that he has joined of record a member of the District of Columbia bar in the case in which he desires and deserves to appear and otherwise complied fully with the applicable local rule, that he has not been accused or found guilty of any improper or unlawyerlike conduct in relation

to the case in which he now wishes to appear *pro hac vice,* and that he has not been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court. In fact, when finally afforded a full and fair hearing, he was conclusively exonerated of all charges of such wrongdoing. Petitioners reassert that under these circumstances no authority exists in law or policy for the notion that a trial court may exercise its discretion to deny Mr. Belli's admission *pro hac vice.*

It is therefore clear from the record that the trial court plainly abused its discretion by summarily denying Petitioners' application after refusing to hear any arguments in its support. In so doing, the trial court disregarded pertinent facts and conclusions of law. Action of this nature is unreasonable, arbitrary or fanciful, and therefore an abuse of discretion. *United States v. McWilliams,* 82 U.S. App. D.C. 259, 163 F.2d 695, 697 (D.C. Cir. 1947).

Where, as here, the record reveals absolutely nothing which would disqualify an applicant from admission *pro hac vice,* a trial court *must* grant admission or be compelled to do so upon its refusal.

The District Court has refused the admission of Melvin M. Belli *pro hac vice* and has refused to accept a written motion and order on his behalf; and the Court of Appeals, in denying the Petition for Writ of Mandamus, has refused to correct the trial court's error. The Writ of Certiorari should be granted to correct the summary and unconstitutional

denial of Mr. Belli's application to appear *pro hac vice* and of his terribly injured clients' right to be represented in this matter of grave importance by the counsel of their choice.

B. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO WHETHER SUMMARY DISPOSITION OF AN APPLICATION TO APPEAR PRO HAC VICE IS CONSISTENT WITH DUE PROCESS.

Two Courts of Appeals have considered the standard which obtains in denying an application to appear *pro hac vice.* The Fifth Circuit, in *In re Evans, supra,* held that an applicant who demonstrates good standing in a state bar may not be denied permission to appear without being informed of specific instances of the unethical or offensive behavior with which he is charged and without being afforded a hearing on the record in which he has adequate opportunity to defend himself from the charges. In so holding, the court recognized that the arbitrary and capricious exercise of discretion by a trial court does not comport with standards of fairness and due process.

By contrast, in an earlier *per curiam* decision, the Fourth Circuit termed admission *pro hac vice* "a privilege, the granting of which is a matter of grace." *Thomas v. Cassidy, supra,* 249 F.2d at 92.

In rejecting Mr. Belli's application, the District Court failed to indicate which standard it deemed applicable. *In re Relf, supra,* No. 76-2073 (Leventhal, C. J., dissenting). It is to be presumed from its summary disposition of the matter that the Court by implication adopted the Fourth Circuit position.

In view of the standards of due process made applicable to attorneys by this Court in cases involving admission to practice and disciplinary matters (see cases cited *supra* at A.2), an evidentiary hearing as required by *In re Evans, supra,* is compelled by the Constitution.

The conflict thus arising among the Circuits concerning whether to afford the constitutional safeguard of due process to attorneys practicing before the Federal Bench is disturbing and serious. This conflict justifies granting a Writ of Certiorari to review the judgment below.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated, May 25, 1977.

(Appendices Follow)

APPENDICES

Appendix "A"

United States Court of Appeals for the
District of Columbia Circuit

September Term, 1976

No. 76-2073

In re: Mary Alice Relf, Minnie Relf and Katie Relf, by and through their next friend, Lonnie Relf, Petitioners.	Civil Action 74-224

[Filed Mar. 3, 1977]

Before: Tamm, Leventhal and Robb, Circuit Judges

ORDER

On consideration of petitioners' petition for writ of mandamus and supplemental brief in support thereof, it is

ORDERED by the Court that the petition is denied.

Per Curiam

Circuit Judge Leventhal dissents for the reasons set forth in the attached memorandum.

MEMORANDUM

Leventhal, Circuit Judge, dissenting: I would request responses pursuant to F.R.A.P. 21(b). The District Judge did not give reasons at this time for his denial of the motion to appear *pro hac vice* but stated that it was a matter on which he had already ruled. The District Judge had written an opinion in support of a ruling denying a previous motion to permit a *pro hac vice* appearance involving the same attorney but a different case. *In re Belli,* 371 F.Supp 111 (D.D.C. 1974). In the 1974 opinion the District Judge said that the applicable test is stated in *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957), *cert. denied,* 355 U.S. 958 (1958). In the *Cassidy* case the court said that appearing *pro hac vice* was not a right but a privilege, "a matter of grace resting in the sound discretion of the presiding judge," and could be denied for "unlawyerlike conduct." In the case of applicant Belli, the District Judge stated that an appearance *pro hac vice* could be denied for statements, casting doubt on the integrity of a judge, that were "recklessly made . . . in complete disregard as to the factual accuracy of his statements."

This seems to be a matter on which there is a conflict of circuits, with *In re Evans,* 524 F.2d 1004 (5th Cir. 1975). *Evans* requires that an application for admission *pro hac vice* be granted unless there is a showing that the applicant "has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." Under *Evans,* a trial court with evi-

dence of misconduct must give the attorney adequate notice of the specific allegations against him, hold a hearing on the record and provide the attorney with an opportunity to defend himself and his reputation.

In this posture of the matter, I do not believe summary disposition is appropriate. The Court of Appeals should determine on the merits what it considers the sound standard. Mandamus is the appropriate procedure for raising this question. *In re Evans, supra; Thomas v. Cassidy, supra.*

An additional reason for requesting responses is the presence of the applicant's First Amendment contentions. The same statements that prompted the District Judge to deny the *pro hac vice* motion in *In re Belli* were the subject of disciplinary proceedings in California. Following a three-day adversary hearing, the Local Administrative Committee for the State Bar of California, District 4, concluded that Belli's statements were made with neither actual malice nor gross negligence. Applying the standards of *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Committee held that Belli could not be disciplined consistent with the Constitution. *In the Matter of Belli,* No. S.F. 2247 (October 6, 1975).

Of course, the District Judge's finding that Belli's statements were "recklessly made . . . in complete disregard as to the factual accuracy of his statements" is in apparent conflict with the conclusion of the State Bar Committee. However, the District Judge's opinion does not state that the standards of *New York Times v. Sullivan* were being applied. Absent some

clear indication, I am reluctant to conclude that the District Judge ruled on the question whether Belli's remarks are protected by the First Amendment. In any event, it does not appear that the District Judge held an adversary hearing on the matter.

In my opinion, we should request responses to assist the Court in determining the standard applied by the District Judge and, if the case is not appropriate for summary affirmance by this Court, should arrange for plenary review of the issue on the merits, on the application for mandamus.

It may be obvious but to avoid any possible misunderstanding I close by saying that this opinion does not mean that I have concluded that Mr. Belli is entitled to enter a *pro hac vice* appearance, nor does it foreshadow what standard or procedure I think is appropriate, but only that the matter warrants a deliberative ruling after opportunity to make a full submission on the issue. Finally, whatever the merits of this petition, the issue is completely separate and apart from the issue of the control that the trial judge may properly exercise in his courtroom in the face of improper or untoward actions or omissions by counsel. The discretion and authority of the trial judge in that regard applies whether the counsel involved is a member of the bar of the court or has entered an appearance *pro hac vice.*

Appendix "B"

In the United States District Court
For the District of Columbia

Relf,	Plaintiffs,	Civil Action No. 74-224
vs.		
U.S.A.,	Defendant.	

EXCERPT OF PROCEEDINGS
Washington, D.C.
November 8, 1976

The above-styled matter came on for hearing in open Court at 2:00 o'clock, P.M., before:

The Honorable Oliver Gasch
United States District Judge

Appearances:

On behalf of the Plaintiff:
Kent A. Russell, Esquire
Henry Weil, Esquire

On behalf of the Defendant:
Donald Jose, Esquire
Neil Peterson, Esquire.

Regis Griffey
Official Court Reporter

EXCERPT OF PROCEEDINGS

• • • • • • •

Mr. Weil: Good afternoon, Your Honor. I am Henry Weil, local counsel in the case for the Plaintiff.

I would like to introduce this afternoon to Your Honor Kent Russell whose appearance has previously been entered in the case from the California Bar.

At this time, also, Your Honor, preliminarily, I'd like to file with the Court to admit as co-counsel along with Mr. Russell for purposes of trial, the admission pro hac vice of Melvin M. Belli.

The Court: The Court has ruled on Mr. Belli's status. That will be denied. I will admit Mr. Russell pro hac vice to argue this motion.

Mr. Weil: Would Your Honor want to accept the papers for filing?

The Court: The Court has ruled on Mr. Belli's proposal.

Mr. Weil: Thank you.

• • • • • • •

Certified: /s/ Regis Griffey, Official Reporter

Appendix "C"

The State Bar of California
Before Local Administrative Committee
For State Bar District 4

No. S.F. 2247

In the Matter of
Melvin Mouron Belli,
A member of the State Bar.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS

The above-entitled proceedings came on regularly for hearing on the merits before this Committee on August 5, 6 and 7, 1975. Present at the hearing were John E. Troxel, Chairman, Stephen M. Tennis and William S. Mailliard, Jr., Members of the Committee, Michael J. Conklin and John G. Schwartz, Examiner and Co-Examiner respectively, Melvin Mouron Belli, Respondent and Kent A. Russell and Sydney Irmas, Jr., Counsel for Respondent. The hearings on the merits were reported by Richard S. Adams of Schiller & Combs.

The Respondent filed an Answer and an Amended Answer to the Order to Show Cause, and the matter was at issue on the Notice and the Amended Answer.

After full consideration of the evidence adduced, the Committee makes its Findings of Fact and Conclusions as follows:

Respondent, Melvin Mouron Belli, is now, and at all times since November 15, 1933, has been, a Member of the State Bar of California.

Count One

I.

On or about May 14, 1973, the Respondent appeared on the Merv Griffin television program and participated in a nationwide broadcast. A somewhat inaccurate transcript of that show and an audio tape of the show were admitted as State Bar Exhibit I and contain, *inter alia,* the remarks set forth in Paragraph III(a) through (f) of the Notice to Show Cause.

II.

Respondent's remarks hereinabove referred to, made reference to the civil suit in the United States District Court for the District of Columbia, entitled, "*Charlene Morris, et al. v. Children's Hospital,* Civil Action No. 575-71" and to the Honorable John Lewis Smith, Jr., who presided at the trial of said lawsuit.

III.

Respondent's remarks made to Merv Griffin, before a nationwide television audience, as set forth in the transcript (Exhibit I) were:

> "I had one in Washington, D.C., the other day where the judge turned out to have the lawyer

> who represents all of the hospitals in the district and we were suing the hospitals. It was his son and he was living with him. Listen, the Judge sitting in on this case was excused from a similar type of case just before and told not to sit. He sat on our case and we didn't know anything about this . . . And there wasn't a word in that case to say this publicly. I say this publicly because they are true and I think they should be corrected.
>
> "Let me just finish this one thing. Here's this little girl . . . she was a black girl and Washington verdicts are low. We tried this case before a black jury. There was 64 veniremen—people from whom you choose your jurors. Sixty-four. Sixty of them were all black. And here was a wonderful thing to see. Here in Washington, where they couldn't sit on the same side of the courtroom ten years ago. Now, we're dependent upon the blacks there to give us justice. And they give good justice. They're very intelligent, very patient. They're wonderful jurors. They came in with an award for this little blind girl against the hospitals. They were giving this little girl dilantin. She got Stephen's-Johnson syndrome, which means she got untoward effects from taking too much dilantin. She became blind. She's fifteen. Beautiful tall little girl. They took her before that jury and the jury awarded $900,000. Two weeks later, this judge set it aside and said we're going to set the jury verdict aside. Some of the jurors called us just on their own motion, and they were really shocked about this. I think that judge was wrong in sitting on that case when he knew that he had been excused from similar cases against a similar defendant and

then having his son representing the Medical Association of the District of Columbia and living with him.

"We didn't know about that until after he had decided that the verdict should be set aside. The $900,000 to the little girl. Now we have made motions, and I can mention this, too, because there was a big story in the *Washington Post* on that just the other day. That's not right to have a thing like that.

"But it's rare that those things happen. Most of our . . . ninety-nine and nine-tenths of our judges advisedly are not only learned but are good, and things like this don't happen . . . when they do happen, they shock me and I think they shock all of us."

IV.

Some of the remarks made on the Merv Griffin Show were not true or were only partially true, as follows:

(a) Judge Smith's son represented the District of Columbia Medical Society, not all of the hospitals in the District (as correctly stated in the latter part of Respondent's remarks).

(b) No evidence was introduced affirmatively showing that Judge Smith had ever been told not to sit in similar cases (although he had recused himself in other medical malpractice cases).

(c) Washington, D.C. courtrooms were not segregated at the time stated by Respondent.

(d) Judge Smith's son was not living with Judge Smith (however, the Washington, D.C., telephone directory indicated that he was).

V.

Both the State Bar and Respondent agree that this matter is governed by the standards set forth in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.E.2d 686, 86 S.Ct. 710 (1964). The Committee agrees. Applying the *Times* standard to this case, Respondent cannot be subject to disciplinary action for his remarks unless the State Bar establishes by clear and convincing evidence that Respondent's remarks were made with "actual malice"—*i.e.*, that they were made with knowledge of their falsity or with reckless disregard of whether they were false or not. The State Bar also asserts that discipline may be imposed for "grossly negligent" remarks. The Committee is unsure whether the State Bar is asserting a standard less than recklessness or whether it is simply restating the *Times* standard. However, for the reasons set forth below, the distinction between the two standards, if any, is immaterial to the outcome of this matter.

The State Bar did introduce evidence in support of its allegation of malice or gross negligence. The evidence did establish that the trial judge had given Respondent a "bad time" during the trial, had failed to disclose his son's relationship with the medical association, and had set aside a verdict for Respondent's client, which at that time was the largest malpractice judgment ever awarded in the District of Columbia. Respondent volunteered his remarks on a nationwide television show shortly after the events referred to; they were not made in response to any particular question by other members of the show.

Respondent testified that he had been ill at the end of the trial and had not participated directly in some of the events forming the basis of his remarks. His information concerning those events was obtained from the affidavit of the plaintiff, from conversations with other attorneys, an investigator, from a newspaper article, and, with regard to segregation in the District of Columbia courtrooms, on his own recollection of the facts. He denied any intention to impugn the trial judge or the courts, and stated that he believed his remarks to be true. In addition, as noted above, the District of Columbia telephone book disclosed a listing for the judge's son at the judge's residence.

Based upon the foregoing, the Committee finds that, to the extent Respondent's remarks were untrue or only partially true, the State Bar failed to establish by clear and convincing evidence that the remarks made by Respondent were made with malice—*i.e.*, that they were made with knowledge of their falsity or with disregard of whether they were false or not. In addition, the State Bar failed to establish by clear and convincing evidence that Respondent was grossly negligent in making those remarks.

Count Two

I.

On or about January 17, 1972, Respondent appeared on the Phil Donahue Television Show and participated in a television broadcast by Station WLWD, Dayton, Ohio, wherein Respondent made certain

remarks, a partial transcript of which was admitted in evidence as State Bar's Exhibit II.

II.

Respondent's remarks made reference to a civil suit started in the Court of Common Pleas, in Lucas County, Ohio, entitled *William Driscoll v. Paul Block, Jr., et al.,* No. 199 2334, the various appeals in that case, and to Honorable Kingsley A. Taft, the then Chief of Justice of the Ohio State Supreme Court.

III.

Respondent stated to the television audience, in response to a question by Mr. Donahue:

> "Oh, yeah. $365,000 for Judge Driscoll, one of our best judges—up there in Toledo—and we had this warrant against Paul Block of the *Toledo Blade*——
>
> "We lost on appeal. I remember the night before the case was argued in the Supreme Court. The Chief Justice . . . has his arm around the publisher of the newspaper giving him an award for good journalism. This is fact.
>
> "No, I won. We were robbed upstairs, but we won downstairs. . . .
>
> "I'm not upset. I just think that Judge Bill Driscoll was robbed upstairs in your Supreme Court, and I think the opinion was a lousy opinion, and I think any lawyer that reads the trial record will agree with me. I don't think the Chief Justice should have been giving the defendant, the night before he heard this argument in the Supreme Court, an award for good journal-

ism when I had sued that editor and had collected, at least up until then, $365,000 against him. That isn't good appellate practice in my book. I'll say that to the Justice.

"You think that's right? Here's a judge that I'm going before in the Supreme Court, and he's gonna decide this case—and . . . the night before, he's got his arm around the defendant giving him an award for good journalism? And we have just sued him and collected $365,000? Wouldn't that make you just a little concerned? That this judge may have prejudged the case? Yes sir, it would me. And it did. And he had."

IV.

Some of Respondent's remarks were not true:

(a) The evidence indicates that the award presentation was a year preceding the date the case was argued before the Supreme Court, not the night before.

(b) The photographic evidence does not show the Chief Justice with his arm around Paul Block (although photographs did show them standing in close proximity to each other).

(c) The Court of Appeals reversed the verdict in favor of Respondent's client. The Supreme Court only denied a Petition for Certiorari.

V.

The State Bar failed to introduce any evidence relating directly to Respondent's state of mind at the time he made the remarks on the Phil Donahue show. Since Respondent's remarks were made five

and a half years after the trial, were made spontaneously in response to a "lead-in" by the moderator and were made in part relying on what Respondent's client, Judge Driscoll, told Respondent, the Committee declines to infer from the falsity of the remarks that they were made with malice (*i.e.*, that they were made with knowledge of their falsity or with reckless disregard of whether they were false or not) or that Respondent was grossly negligent in making those remarks. Accordingly, the State Bar has failed to meet its burden of establishing by clear and convincing evidence that Respondent's remarks were made with malice, or with gross negligence.

Conclusions

From the foregoing Findings of Fact, the Committee concludes:

As to both Counts I and II, the State Bar failed to meet its burden of establishing by clear and convincing evidence malice or gross negligence on the part of Respondent in making the statements which the Committee found either to be untrue or to be "half-true."

Recommendations

The Committee believes that the Respondent made injudicious statements to what was known to Respondent to be substantial audiences, but that the State Bar failed to prove "actual malice" as required by the United States Supreme Court in *New York Times Co. v. Sullivan.* Nor did the State Bar establish that those statements were made with gross

negligence. The Committee, therefore, recommends that the proceedings against Respondent be dismissed.

Dated: October 6, 1975.

John E. Troxel, Esq., Chairman
Local Administrative Committee
for State Bar District 4

Stephen M. Tennis, Esq., Member

William S. Mailliard, Esq., Member